(1)

91-777

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CENAC TOWING COMPANY, INC.,
Petitioner,

v.

SOUTH TEXAS TOWING COMPANY, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Following a jury trial, the district court entered judgment against respondent finding that a non-settling defendant in a maritime collision case was liable for its share of damages in accordance with principles of proportionate fault. The Fifth Circuit, reversing the District Court, gave respondent a credit for sums paid by petitioner to the original plaintiff and invalidated the judgment. In so doing, the Fifth Circuit placed itself in direct conflict with the Eighth Circuit.

The question presented is:

1. Whether a non-settling defendant in a maritime case remains liable for its proportionate share of fault regardless of the amount paid by the settling defendant, or whether the sums paid by a settling party are credited to the non-settling defendant?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Cenac Towing Company, Inc., ("Cenac"), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeal for the Fifth Circuit is reported at 938 F.2d 599 (5th Cir. 1991), and is reprinted in the Appendix to this Petition at Pet. App. 1a-3a. The opinion of the district court on the central issue presented was given orally and not recorded in the record though reflected in the judgment.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1991. A Suggestion for Rehearing *en banc* was denied on September 16, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(c).

STATEMENT

The petition in this case arises out of a decision by the United States Fifth Circuit Court of Appeal to reverse its prior decision in *Leger v. Drilling Well Control*, 592 F.2d 1246 (5th Cir. 1979), in favor of a rule of law granting a non-settling defendant in a maritime collision case a credit for all sums paid to the plaintiff by a settling defendant. The Fifth Circuit exculpated respondent despite the fact it had been determined to be 30% responsible for Mr. Rollins' injuries on grounds that the total damages as found by the jury were less than the amount paid in settlement by petitioner.

These proceedings are relatively uncomplicated. Mr. and Mrs. Rollins instituted suit in the United States District Court for the Western District of Louisiana on December 14, 1987 seeking to recover for personal injuries received in a maritime collision which occurred on April 28, 1987. The plaintiffs sought recovery against Mr. Rollins' employer, the respondent, under the Jones Act, 46 U.S.C. § 688, and joined petitioner as a defendant seeking recovery under the general maritime law of negligence. Both defendants filed cross-claims against each other seeking contribution in the event either was cast in judgment.

Shortly after suit was filed, respondent's insurer, which had also been joined as a party,[1] became insolvent. This insurer's insolvency prompted the Rollins to approach respondent in hopes of negotiating an amicable settlement

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[1] The Anglo-American Insurance Company was named under the terms of the Louisiana Direct Action Statute, L.R.S. 22:655.

of their claims. These discussions led to an agreement under which petitioner paid $250,000.00 to the Rollins. Pet. App. 26a-34a. In exchange, petitioner obtained a complete release and was assigned an interest in the Rollins' claims against respondent.[2]

Upon learning of the settlement, respondent brought a motion seeking a declaration that it would be entitled to a credit for the amounts paid by petitioner to the plaintiffs. The district court orally ruled that respondent would not receive a credit.[3] Relying on *Leger v. Drilling Well Control*, 592 F.2d 1246 (5th Cir. 1979), the district court advised the parties that respondent would be liable in full for its proportionate share of fault.

A trial on the merits was held on June 11-13, 1990. Before jury selection, the district court orally dismissed petitioner's cross claim against respondent for contribution, though permitted petitioner to intervene as an assignee of the plaintiffs. Pet. App. 17a-22a. In response to special interrogatories, the jury found respondent 30% at fault and assessed total damages of $183,000.00. Pet. App. 13a-16a. Consistent with its prior ruling, the District Court entered judgment against respondent for 30% of that amount, or $54,900.00. Enforcing the settlement, the district court awarded petitioner $50,000.00 Pet. App. 6a-7a.

The Fifth Circuit reversed. *Rollins v. Cenac Towing Company, Inc.*, 938 F.2d 599 (5th Cir. 1991). It concluded that because the jury awarded less than the amount

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[2] Cenac was to receive the first $50,000.00 of any recovery. The Rollins were to receive the next $50,000.00. The parties agreed to divide any further recovery up to $500,000.00 equally. Such settlements are frequently referred to as "Mary Carter" agreements. *Daniel v. Penrod Drilling Company*, 393 F. Supp. 1056 (E.D. La. 1975); *Riechenback v. Smith*, 528 F.2d 1072 (5th Cir. 1976).

[3] The parties agreed to try the case before a United States Magistrate, the Honorable John F. Simon. This ruling is not part of the record though is implicit in the judgment entered below.

of the settlement that the Rollins had been fully compensated and could not recover from respondent. Respondent was given "full credit" for petitioner's settlement, "wiping out any liability South Texas may have otherwise had". Pet. App. 3a, citing *Hernandez v. M/V RAJAAN*, 841 F.2d 582, 591, (5th Cir.), *cert. denied*, 488 U.S. 981, 109 S.Ct. 530, 102 L.Ed.2d 562 (1988); *Self v. Great Lakes Dredge & Dock Company*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988). A suggestion for rehearing *en banc* was perfunctorily denied. Pet. App. 4a-5a.[4]

REASONS FOR GRANTING THE WRIT

This case presents important and troubling questions about the effect of partial settlements in federal maritime cases. By exonerating respondent here, the court of appeals implicitly rewarded a defendant for refusing to participate in a pre-trial settlement and penalized a seaman and his assignee for the seaman's good settlement. Notwithstanding this Court's landmark 1975 decision to apply principles of comparative fault in maritime collision cases,[5] the decision below refuses to allocate fault comparatively by exculpating a party adjudged to be at fault. This issue is faced repeatedly by litigants in maritime cases.

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[4] The suggestion was filed on August 30, 1991 and denied on September 16, 1991. The suggestion relied heavily on the fact that two months before the Fifth Circuit had endorsed the "pro-rata" approach used by the Magistrate to cast respondent in judgment. *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341 (5th Cir. 1991). *Teal* was corrected on September 6, 1991, seven days after the filing of the suggestion, to delete the language rejecting the "credit" approach adopted by the appellate court in this case. The corrected opinion now appears in the bound volume of the Federal Reporter. The original uncorrected slip opinion which appeared in the advance sheets is reproduced at Pet. App. 35a-44a.

[5] *United States v. Reliable Transfer Company*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975).

The decision of the Fifth Circuit merits review for several reasons. First, it is in direct conflict with a decision of the Eighth Circuit holding a non-settling defendant liable for its proportionate degree of fault. *In the Matter of Associated Electric Cooperative*, 931 F.2d 1266 (8th Cir. 1991). Second, the result is incongruous in light of ancient principles of maritime law forcing mutual wrongdoers to share in the damages caused by each. *Cooper Stevedoring v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974). Finally, we believe the decision below was based upon an erroneous interpretation of *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979), and thus merits consideration by this Court.

I. THE EFFECT OF PARTIAL SETTLEMENTS IN MARITIME CASES IS A CONFUSED AND IMPORTANT AREA OF THE GENERAL MARITIME LAW

This once clear area of federal maritime law is now in a state of disarray. Prior to the 1987 Eleventh Circuit opinion in *Self v. Great Lakes Dredge & Dock Company*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988), it was generally accepted that the decisions of this Court in *Cooper Stevedoring* and *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975), mandated an apportionment of fault between settling and non-settling defendants. See *Leger v. Drilling Well Control*, 592 F.2d 1246, 1249 (5th Cir. 1979). In *Self*, the Eleventh Circuit rejected *Leger* based upon its conclusion that *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979), decided two weeks after *Leger*, had changed the law. In *Edmonds*, this Court held that an injured longshoreman could recover his full damages from a negligent shipowner who was only partially responsible for the injury. Relying on the statutory immunity from tort liability conferred on stevedore-employers, 33 U.S.C.

Section 905(a), the *Edmonds* court held the shipowner liable for not only its proportionate degree of fault, but also for the employer's share of responsibility.

The *Self* panel read *Edmonds* expansively to implicitly reject the philosophy of *Leger* that it is the plaintiff who bears the loss or obtains the gain from any settlement he makes. The Eleventh Circuit suggested that *Edmonds* required that the risk of loss or gain be borne by the defendants rather than the injured worker. *Id.* at 1546. The opinion ignored the basis upon which *Edmonds* was decided—the fact that Edmonds' employer was statutorily immune from suit. Unlike *Edmonds*, the defendant in *Self*, as well as in this case, was not immune. In the final analysis, the *Self* court felt compelled to adopt a *pro tanto* rule so as not to penalize Self's widow for having entered into an improvident settlement with another defendant. *Id.* at 1548, n.5.

Self and *Edmonds* embody a judicial philosophy of insuring that tort victims are fully compensated. This philosophy has been inverted in the Fifth Circuit to protect tortfeasors by giving them the benefit of a seaman's favorable settlement. This curious transformation began with *Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir.), *cert. denied*, 488 U.S. 981, 109 S.Ct. 530, 102 L.Ed.2d 562 (1988), where the court, without discussion, adopted *Self* and interpreted it as requiring *reduction* of a plaintiff's recovery by the amount of his pre-trial settlement. The justification for using *Self* to reduce rather than augment recovery was a perceived need to eliminate any possibility of double recovery, a need not discussed in either *Self* or *Edmonds*.

The meaning and viability of *Hernandez* was quickly tested in *Myers v. Griffin Alexander Drilling Co.*, 910 F.2d 1252 (5th Cir. 1990), where the Fifth Circuit squarely held that *Hernandez* had overruled *Leger*. *Myers* added a twist to prior jurisprudence by exempting any sums owed back to a settling defendant from the amount

to be credited. Shortly after *Myers*, the Fifth Circuit decided *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341 (5th Cir. 1991). In its original published opinion,[6] the *Teal* court directly contradicted *Myers* and *Hernandez* by endorsing *Leger* and its proportionate fault rule as the law of the circuit. Seven days after the filing of petitioner's suggestion for rehearing, the original *Teal opinion* was corrected to delete its endorsement of the proportionate fault rule. See 933 F.2d 341 (5th Cir. 1991). The original error in *Teal* discloses the extent to which not only litigants, but able judges are confused by the muddled law of maritime settlements.

The Eighth Circuit has taken a diametrically opposite view. In *Matter of Associated Electric Cooperative*, 931 F.2d 1266 (8th Cir. 1991), the court thoroughly reviewed the case law and adopted the proportionate fault rule. *Associated Electric* discounted the risk of double recovery by suggesting that this risk and the risk of insufficient recovery ultimately "balance each other out". *Id.* at 1271. The opinion specifically rejects the notion that *Edmonds* overruled *Leger*, finding that *Edmonds* did not involve the same public policy issues raised by maritime settlements. We agree with these observations. *Edmonds* by its terms is limited to the specific question of statutory immunity and does not address settlement issues.

The Eleventh and Fifth Circuits thus employ the credit approach.[7] The Ninth Circuit, although barring contribution claims against settling defendants, has declined to decide the issue. *Miller v. Christoper*, 887 F.2d 902 (9th Cir. 1989). One district court selects the approach to be used on a case by case basis. *Vaughn v. Marine Transport Lines, Inc.*, 723 F.Supp. 1126 (D.Md. 1989). The Eighth Circuit, and formerly the Fifth, employ the pro-

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[6] This is reproduced at Pet. App. 35a-44a.

[7] The First Circuit does also. *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908 (1st Cir. 1987).

portionate fault rule. The Restatement (Second) of Torts discusses three possible approaches and notes the lack of a consensus in both state and federal courts.[8]

The various approaches create uncertainty in the minds of litigants and discourage settlements in those jurisdictions which have not yet taken a position. The divergent opinions of the courts of appeal create capricious results dependent upon the *situs* of the accident. One rule applies to a seaman injured in St. Louis, while a second applies to a seaman injured in the Port of New Orleans. In order to restore predictability and thereby foster compromises, petitioner respectfully requests that the issue be considered by this Court.

II. THE PROPORTIONATE FAULT RULE SHOULD BE ADOPTED AS THE BEST ALTERNATIVE

We agree with the Eighth Circuit's view that the *Leger* proportionate fault approach is the better rule. The mechanical credit formula which has been adopted in the Fifth Circuit is legally underpinned by two notions. The first is the suggestion that *Edmonds* mandates such a conclusion by espousing a philosophy intended to guarantee a tort victim full recovery. Both the First and the Eighth Circuits have recognized that the sweep of *Edmonds* is not so broad, and as previously noted, the

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[8] These are: (1) allowing an action for contribution against a settling tortfeasor by any other tortfeasor who has paid more than his equitable share of plaintiff's claim; (2) imposing a bar to contribution claims against a settling tortfeasor, perhaps in conjunction with a requirement that the settlement be in "good faith"; and (3) reducing the claim of the plaintiff by the pro rata share of a settling tortfeasor's liability for damages, which has the effect of eliminating any reason to sue a settling tortfeasor for contribution. *Miller v. Christopher*, at 905, *citing* Restatement (Second) of Torts Section 886A comment m (1979); *Matter of Associated Electric*, at 1269. For a thorough discussion of the alternatives, please consult *Commercial Clearing Corp. v. Allied Chemical Company*, 1989 A.M.C. 769 (Cal. App. 4 Dist. 1988), where a state appellate court analyzed though did not choose between the competing positions.

Edmonds opinion itself does not discuss the effect of partial settlements.[9] The second justification, which pervades the recent Fifth Circuit jurisprudence, is the goal of precluding a "double recovery". As an initial matter, the opinions of this Court, including *Edmonds*, *Reliable Transfer*, and *Cooper Stevedoring*, do not identify this as a goal of overriding concern. Perhaps more importantly, the *Leger* approach does not entail a double recovery *from the non-settling defendant*. *Leger*, at 1250. In a proportional fault analysis, the court simply awards the plaintiff damages based upon the remaining wrongdoer's percentage of fault. Although the plaintiff may ultimately receive more than the total damages assessed by the jury, this disparity is created by the parties themselves and not by the court through the trial process.[10]

The reasoning employed by the court of appeal in this case shows the extent to which the Fifth Circuit has divorced itself from the logic of *Self* and *Edmonds*. The latter opinions were motivated by a desire to insure an innocent party full recovery. Here, the court of appeal has achieved a contrary result by insulating a wrongdoer from liability to an innocent plaintiff who was injured while eating lunch in the galley of respondent's tug. Rather than serving to protect plaintiffs, as they were designed to do, *Self* and *Edmonds* have been used in this case to shield a culpable and solvent defendant.

Even the proponents of the *Self* rule acknowledge its weaknesses. Chief among these are the concern expressed

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[9] *Joia, supra*, at 916 (indicating that *Edmonds* "is not controlling"); *Matter of Associated Electric*, at 1270-1271.

[10] The fear of double recovery exists in every complete settlement. Two defenadnts who join in a settlement to fully compromise a dispute may, and no doubt often do, pay a plaintiff more than the amount he ultimately would have received had the case been tried. Carried to its logical end, the aim of the Fifth Circuit in precluding double recoveries resulting from settlements would require judicial scrutiny of every compromise agreement.

in *Self* that the rule necessarily creates a disparity in the amounts paid by settling and non-settling defendants. *Id.* at 1547-48. This concern that the approach entails inequity was outweighed in *Self* by the undeniable goal of maritime law to provide full and quick compensation to injured seaman. In this case, that central goal was not implicated; Mr. Rollins' claims against respondent were sacrificed not in the name of insuring full and fair compensation, but as a safeguard against double recovery.

The prevention of double recovery, in our view, does not outweigh the philosophical and practical consequences which stem from the *pro tanto* rule. The rule does not promote settlements nor achieve equitable results. It is a deterrent to settlement. For example, in a case where negligence of one defendant is either admitted or certain, a plaintiff has no incentive to settle his claims against that defendant for anything less than the full value of the case. If he takes less in such a situation, he runs the risk of receiving less than full value if the remaining defendant is found free from fault. In order to settle such a case, that plaintiff would have to trade the certainty of receiving the full value of his claim for the uncertainty of being able to demonstrate liability on the part of the remaining defendant. The rule thus creates an unreasonable choice for plaintiffs. It likewise creates an unreasonable choice for defendants who will be asked to pay judgment value for such claims. Such defendants, knowing that full value settlements will extinguish their rights of contribution against non-settling defendants, will no doubt choose to go to trial in hopes of attributing some fault to the other defendant. As a result, few fair and reasonable settlements will be made.

The Fifth Circuit's recent approach to this problem may encourage collusive settlement agreements. A plaintiff, knowing that he will receive his full damages, may elect to take a nominal contribution from one of two equally liable defendants without fear of minimizing his

ultimate recovery. In the process, the non-settling defendant will be victimized by such an unscrupulous settlement, or at a minimum, be forced to prove it was entered into in bad faith. The credit or *pro tanto* approach thus has the undesirable practical consequences of either discouraging realistic settlements or encouraging collusive ones. These consequences outweigh the risk of double recovery.

The inequity of the credit approach is evident from the facts of this case. Respondent has gone unpunished and undeterred despite its tortious conduct. It has in fact been rewarded for refusing to pay maintenance and cure and participate in settlement. By contrast, petitioner has been punished for doing what courts generally encourage parties to do—settle cases. Petitioner has been ordered to bear full financial responsibility for an injury it only partially caused.

The Fifth Circuit's holding in this case allows a non-settling tortfeasor to take advantage of a plaintiff's "good settlement". There is certainly no reasoning contained in any decision which would support the notion that a solvent maritime tortfeasor should be able to avoid payment of its apportioned damage award to the maritime plaintiff or his assignee. The maritime law has long recognized that liability for damages should be equitably distributed among wrongdoers. This Court has explained that since the 12th century, mutual wrongdoers have been forced under maritime law to share in the damages caused by each. *Cooper Stevedoring*, *supra*, at 417 U.S. 110-111. *Cooper Stevedoring* is emblematic of the maritime law's strong desire to apportion fault fairly among tortfeasors by enforcing rights of contribution among the parties. This Court's preference for a system of comparative fault in maritime collision cases is now beyond dispute in light of *Reliable Transfer*, *supra*, and its abrogation of the outdated *moities* rule.

The shared responsibility doctrine of these cases has been undone by the panel opinion in this case. Respondent pays nothing; petitioner pays it all. Even if *Self* correctly interprets the decisions of this Court, some rule must be fashioned to prevent this type of injustice. One possible solution would be to preserve the right of contribution a settling party has against a non-settling party.[11] Such a result, in addition to comporting with *Cooper Stevedoring* and *Reliable Transfer*, would place respondent and petitioner in nearly the same positions they would have been in absent the settlement. The goal of *Self* would be realized without penalizing petitioner for voluntarily entering into a compromise agreement.

For these reasons, *Leger* represents the most equitable solution. It will encourage realistic settlements while deterring collusive ones. Liability will be apportioned based upon fault, and non-settling parties will not be penalized or rewarded by bargains in which they did not participate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[12]

Respectfully submitted,

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[11] The district court ruled that under *Leger* petitioner's right of contribution against respondent was extinguished. Pet. App. 17a-22a. Since petitioner prevailed in the district court, there was no need for it to contest this ruling in the original appeal to the Fifth Circuit.

[12] Neither petitioner nor respondent to our knowledge have any parent or subsidiary corporations.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-4689

GARLAND ROLLINS and JEANETTA ROLLINS,
Plaintiffs-Appellees,

v.

CENAC TOWING COMPANY, INC.,
Defendant-Appellee,

v.

SOUTH TEXAS TOWING,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

Aug. 13, 1991

John A. Jeansonne, Jr., Jeansonne & Briney, Lafayette, La., for defendant-appellant.

Anthony C. Dupre, Ortego & Dupre, Ville Platte, La., for Garland Rollins and Jeanetta Rollins.

Randolph J. Waits, John F. Emmett, Waits & Kessenich, New Orleans, La., for Cenac Towing Co., Inc.

Before GARZA, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:

Garland Rollins, a member of the crew of a vessel, was injured during a collision between vessels owned by his employer, South Texas Towing, Inc. (South Texas), and

Cenac Towing Co., Inc. (Cenac). The district court entered judgment on a jury verdict in favor of Rollins and Cenac and against South Texas. Because we conclude that South Texas is entitled to a full credit for Cenac's settlement with Rollins, we reverse the district court's judgment against South Texas and render judgment in its favor.

I.

Rollins was injured when the South Texas vessel he served aboard collided with one of Cenac's vessels. Rollins and his wife sued South Texas under the Jones Act and the general maritime law. They also sued Cenac under the general maritime law. Cenac and South Texas filed cross-claims against each other. Before trial, Rollins settled his claim with Cenac. Under the settlement, Cenac paid $250,000 to Rollins. In return, Rollins dismissed Cenac as a defendant and assigned to Cenac the right to the first $50,000 he recovered from South Texas at trial.

Rollins proceeded to trial against South Texas. The jury found that South Texas was 30% at fault for Rollins' injury and that Cenac was 70% at fault. The jury assessed Rollins' total damages at $183,000.

Based on the jury verdict, the district court entered a judgment against South Texas in the amount of $54,900 (30% of $183,000). The district court divided the proceeds of the judgment $50,000 to Cenac, and the balance to the Rollinses. South Texas timely lodged this appeal.

II.

The question presented in this case is how to apply the credit for the settlement between Rollins and Cenac to the jury verdict against South Texas. The first step in the analysis is to compare the amount Rollins received in settlement with the amount the jury determined as his total damages. *See Hernandez v. M/V RAJAAN*, 841 F.2d 582, 591 (5th Cir.), *cert. denied*, 488 U.S. 981, 109 S.Ct. 530, 102 L.Ed.2d 562 (1988); *see also Self v. Great*

Lake Dredge & Dock Co., 832 F.2d 1540, 1548 (11th Cir. 1987), *cert. denied*, 486 U.S. 1083, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988). Because the jury found that Rollins' damages were less than the amount he had already received in settlement, Rollins has been fully compensated for his loss and can recover nothing from South Texas. Stated differently, South Texas gets full credit for the $250,000 settlement Cenac made with Rollins, wiping out any liability South Texas may have otherwise had for Rollins' injury which damaged him in the total amount of $183,000.

If the jury had found that Rollins suffered damages in excess of his settlement, Rollins should have been awarded those excess damages from South Texas and his payback agreement with Cenac would have been triggered. *See Myers v. Griffin-Alexander Drilling Co.*, 910 F.2d 1252, 1256 n. 1 (5th Cir.1990). But that is not today's case.

Accordingly, we reverse the district court judgment entered against South Texas and render a take nothing judgment in its favor.

REVERSED and RENDERED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4689

GARLAND ROLLINS and JEANETTA ROLLINS,
Plaintiffs-Appellees,

versus

CENAC TOWING CO., INC.,
Defendant-Appellee,

versus

SOUTH TEXAS TOWING,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC*

(Opinion 8/13/91, 5 Cir., 198—, —— F.2d ——)
(September 16, 1991)

Before REYNALDO G. GARZA, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Proce-

dure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Action No. CV87-2728
SECTION "L"

GARLAND ROLLINS and JEANETTA ROLLINS

versus

SOUTH TEXAS TOWING, INC., and
CENAC TOWING COMPANY, INC.

JUDGMENT

[Filed Jul. 31, 1990]

Considering the Answers to the Special Interrogatories to the Jury dated June 13, 1990,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Answers reached by the jury are hereby made the Judgment of this Court, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of Cenac Towing Company, Inc., and against South Texas Towing Company, Inc., in the full amount of FIFTY THOUSAND AND NO 100 ($50,000.00) DOLLARS, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of Garland Rollins in the amount of FOUR THOUSAND, EIGHT HUNDRED NINETEEN AND 67/100TH ($4,819.67) DOLLARS, and judgment in favor of Jeanetta Rollins, in the amount of EIGHTY AND 33/100TH ($80.33) DOLLARS, and against South Texas Towing Company, Inc., and

IT IS FURTHER ORDERED that all judgment amounts shall bear interest at the legal rate of 8.09% from the date of entry of judgment until paid. All costs are taxed against the defendant, South Texas Towing Company, Inc.

Alexandria, Louisiana, this 31st day of July, 1990.

/s/ John A. Simon
United States Magistrate

APPROVED AS TO FORM:

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APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Action No. CV87-2728-L-0
MAGISTRATE SIMON

GARLAND ROLLINS and JEANETTA ROLLINS

versus

SOUTH TEXAS TOWING and
CENAC TOWING COMPANY, INC.

RULING ON SUBSTANCE OF JUDGMENT

[Filed Jul. 10, 1990]

At the end of the trial, the Court asked counsel to prepare a proposed judgment in accordance with the jury verdict and circulate it for signatures showing approval as to form. However, the parties were unable to agree on the substance of a judgment. Consequently, the plaintiffs and Cenac have sent to me one proposed judgment (unsigned) and South Texas has submitted another (unsigned).

The dispute arose because South Texas now contends that the jury responses to the interrogatories should result in a judgment in favor of South Texas and against the plaintiffs and Cenac dismissing all of the claims of the plaintiffs and Cenac against South Texas. South Texas argues that because the jury answered "No" to interrogatories 1 and 2, expressing its belief that South Texas was not guilty of Jones Act negligence and that its vessel, the Tiffany J, was seaworthy, the Court should ignore the jury's responses to interrogatories 3, 4 and 8 because they are inconsistent with the other findings.

South Texas argues that the jury's affirmative response to interrogatory No. 3 does not constitute a finding of fault against South Texas because the rule of *The Pennsylvania*, with which interrogatories 3 and 4 are concerned, deals only with causation, and not with fault or liability.

Cenac argues that in answering interrogatory No. 3 in the affirmative, the jury explicitly found that at the time of the collision, the Tiffany J was in actual violation of a statutory rule intended to prevent collisions, and that it is well settled under maritime law that violation of a statute constitutes negligence per se, citing *Protectus Alpha Navigation v. North Pacific Grain Growers*, 767 F.2d 1379, 1383 (9th Cir. 1985). Cenac also cites *Reyes v. Vantage S.S. Co., Inc.*, 609 F.2d 140 (5th Cir. 1980) for the proposition that the failure to follow *any* Coast Guard regulation which is a *cause* of an injury establishes negligence per se, and the case of *Dougherty v. Santa Fe Marine, Inc.*, 698 F.2d 232 (5th Cir. 1983) for the proposition that the violation of a statute intended to protect an injured plaintiff constitutes negligence per se. Cenac also cites *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981) for the proposition that violation of any statute is negligence per se where the statute is intended to protect a class of persons to which the plaintiff belonged against the risk of the type of harm which in fact occurred.

South Texas cites *Schoenbaum, Admiralty & Maritime Law*, Section 13-2 for the following proposition:

> "under the rule [*The Pennsylvania*], therefore, the burden of proof, including the burden of persuasion, is effectively shifted as to the causation issue, once it is established that a vessel is guilty of violating a statute or a regulation. The *Pennsylvania* Rule does not establish fault; it is limited to causation."

Schoenbaum clearly states that *The Pennsylvania* rule shifts the burden of persuasion as to the causation issue

"once it is established that a vessel is guilty of violating a statute or a regulation." The jury clearly answered interrogatory No. 3 by finding that at the time of the collision, the M/V Tiffany J was in actual violation of a statutory rule intended to prevent collisions. Therefore, application of *The Pennsylvania* rule was properly put before the jury by interrogatory No. 4.

The jury's answere to interrogatory No. 3 is not in conflict with the jury's finding that South Texas was not guilty of negligence under the Jones Act standards. The jury was never instructed that South Texas would be guilty of negligence *per se if* it was in violation of a statutory rule intended to prevent collisions so the jurors had no reason to believe that interrogatory No. 1 should be answered "Yes" just because interrogatory No. 3 was answered "Yes".

It was counsel for South Texas that drew up the special jury interrogatories and put the first three interrogatories together as different types of fault the jury might find on the part of South Texas. Although South Texas did object to instructing the jury with regard to *The Pennsylvania* rule, it did not object to the form of the interrogatories, particularly, as mentioned, with regard to placing interrogatory No. 3 among the questions pertaining to the finding of fault with regard to South Texas, and then with the instruction immediately following interrogatory No. 3 which told the jury that if its answer to interrogatory No. 3 was "Yes" to go to interrogatory No. 4, and that if their answer to interrogatories 1 or 2 is "Yes" and their answer to interrogatory No. 3 is "No", to skip interrogatory No. 4 and go to interrogatory No. 5.

In sum, although South Texas is correct in its contention that the rule of *The Pennsylvania* does not, *ipso facto*, impose liability, the rule of *The Pennsylvania* is applicable in a collision case once the jury determines that at the time of the collision, the vessel in question was in ac-

tual violation of statutory rule intended to prevent collisions. Since the jury found that to be the case in this suit, it was correct in applying *The Pennsylvania* rule against South Texas.

South Texas further contends that the jury gave inconsistent responses to interrogatories 1, 2 and 8. It is true that if only those interrogatories are considered, the jury's responses would be inconsistene. However, when the jury's responses to interrogatories 3 and 4 and considered, the jury's response to interrogatory No. 8 is completely consistent with those responses. Interrogatory No. 8 asks "To what degree did the *fault* of South Texas Towing, Inc. and Cenac Towing Company, Inc. contribute to Garland Rollins' accident and injuries," and the fault which the jury obviously must have considered was that fault of South Texas which it found in answering interrogatory No. 3. In finding 30% fault on the part of South Texas Towing, Inc., the jury obviously understood that interrogatory No. 3 stated a species of fault on the part of South Texas, and that the jury was to determine the degree which that fault contributed to the accident.

Based on the foregoing analysis, I find that there is no inconsistency in the jury's answers to the interrogatories and that of the two proposed judgments that have been submitted, the judgment in favor of Cenac and the plaintiffs and against South Texas Towing, Inc., is the correct proposed judgment.

Mr. Jeansonne's letter of June 19, 1990, states that in the event the Court prefers Cenac's position over his, that he has no objection to the form of the judgment which Cenac submitted to the Court. Since none of the attorneys had signed their aproval as to the form of that judgment before it was submitted to me, I am hereby sending that original judgment back to Mr. Jeansonne, so that he can sign his approval as to form, send it on to Mr. Dupre for his signature, who can in turn send it

back to Mr. Waits to sign and return to me for my signature and filing into the record.

THUS DONE AND SIGNED at Alexandria, Louisiana, on this 10th day July, 1990.

s/ JOHN F. SIMON
John F. Simon
UNITED STATES MAGISTRATE

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Action No. CV87-2728
SECTION "L"

GARLAND ROLLINS and JEANETTA ROLLINS

versus

SOUTH TEXAS TOWING, and
CENAC TOWING COMPANY, INC.

SPECIAL INTERROGATORIES TO THE JURY

[Filed Jun. 13, 1990]

1. Was South Texas Towing, Inc. guilty of negligence which contributed, even in the slightest, to Garland Rollins' accident and injury?

YES ____ NO X

(Go To Interrogatory No. 2)

2. Was the M/V TIFFANY J unseaworthy, and if so, was her unseaworthiness a legal cause of Garland Rollins' accident and injury

YES ____ NO X

(Go To Interrogatory No. 3)

3. At the time of the collision was the M/V TIFFANY J in actual violation of a statutory rule intended to prevent collisions?

YES X NO ____

(If your answer to Interrogatories 1, 2 and 3 is "NO", skip Interrogatory No. 4 and answer Interrogatories Nos. 5, 6 and 7, and then skip Interrogatories Nos. 8 and 9 and go to Interrogatory No. 10. If your answer to Interrogatory No. 3 is "YES", go to Interrogatory No. 4. If your answer to Interrogatories 1 or 2 is "YES" and your answer to Interrogatory No. 3 is "NO", skip Interrogatory No. 4 and go to Interrogatory No. 5.)

4. Have the M/V TIFFANY J and her owners, South Texas Towing, Inc., established by a preponderance of the evidence that any statutory violation of which the M/V TIFFANY J was guilty could not have been a legal cause of the collision?

YES _____ NO X

(Go to Interrogatory No. 5)

5. Was Cenac Towing Company, Inc. guilty of negligence which was a legal cause of Garland Rollins' accident and injury?

YES X NO _____

(Go to Interrogatory No. 6)

6. At the time of the collision, was the M/V CULLEN CENAC in actual violation of a statutory rule intended to prevent collisions?

YES X NO _____

(If your answer to Interrogatories 5 and 6 is "NO", skip Interrogatories 7 and 8 and go to Interrogatory 9. If your answer to Interrogatory 6 is "YES", go to Interrogatory 7. If your answer to Interrogatory 6 is "NO" and your answer to Interrogatory 5 is "YES", skip Interrogatory No. 7 and go to Interrogatory 8.)

7. Have the M/V CULLEN CENAC, her owners, Cenac Towing Company, Inc., and the plaintiff, established by

a preponderance of the evidence that any statutory violation of which the M/V/ CULLEN CENAC was guilty could not have been a legal cause of the collision?

YES ____ NO X

(Go to Interrogatory No. 8)

8. To what degree did the fault of South Texas Towing, Inc. and Cenac Towing Company, Inc. contribute to Garland Rollins' accident and injuries (the allocated percentages must total 100%).

SOUTH TEXAS TOWING, INC.	30%
CENAC TOWING COMPANY, INC.	70%
TOTAL	100%

(Go to Interrogatory No. 9)

9. What amount of money payable in cash today, would fairly compensate the plaintiffs for:

(a)	Past and future pain and suffering of Garland Rollins, including, if applicable, disability, disfigurement, mental anguish and loss of capacity for the enjoyment of life.	$ 70,000.00
(b)	Medical expenses resulting from the accident.	$ 22,000.00
(c)	Past wage loss of Garland Rollins	$ 38,000.00
(d)	Future wage loss of Garland Rollins	$ 50,000.00
(e)	Loss of consortium and society sustained by Jeanetta Rollins	$ 3,000.00
	TOTAL	$183,000.00

(Go To Interrogatory No. 10)

10. Is South Texas Towing, Inc. obligated to pay maintenance and cure to Garland Rollins as a result of his accident and injury?

YES ____ NO X

(If your answer to Interrogatory No. 10 is "NO", you need go no further. Your foreperson should date and sign this Jury Interrogatory Form and return it to the Marshal. If your answer to Interrogatory No. 10 is "YES", go to Interrogatory No. 11)

11. What amount of money would fairly compensate Garland Rollins for the past maintenance to which he is entitled?

$ _____

(Go To Interrogatory No. 12)

12. What amount of money would fairly compensate Garland Rollins for the past cure to which he is entitled?

$ _____

(Go To Interrogatory No. 13)

13. Is the plaintiff, Garland Rollins, entitled to recover compensatory damages against South Texas Towing, Inc. for its failure to pay plaintiff, Garland Rollins, maintenance and cure?

YES _____ NO _____

(If your answer to Interrogatory 13 is "NO", your foreperson should sign and date this Jury Interrogatory Form and return it to the Marshal. If your answer to Interrogatory 13 is "YES", go to Interrogatory 14.)

14. What amount of compensatory damages do you award plaintiff, Garland Rollins?

Compensatory Damages $ _____

THUS DONE AND SIGNED at Opelousas, Louisiana, this 13 day of June, 1990.

/s/ [Illegible]
Jury Foreperson

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Docket No. CV-87-2728-L

GARLAND ROLLINS, *et ux*

versus

SOUTH TEXAS TOWING

June 11, 1990
8:15 a.m.

Opelousas, Louisiana

REPORTER'S OFFICIAL TRANSCRIPT OF
EXCERPT FROM CHAMBERS CONFERENCE

BEFORE THE HONORABLE JOHN F. SIMON,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES

FOR THE PLAINTIFF:

Ortego & Dupre
By: ANTHONY C. DUPRE, ESQ.
P.O. Drawer 810
Ville Platte, Louisiana 70586

FOR THE DEFENDANT:

Jeansonne & Briney
By: JOHN A. JEANSONNE, ESQ.
P.O. Box 91410
Lafayette, Louisiana 70509

FOR THE INTERVENOR:

Emmett, Cobb, Waits & Kessenich
By: RANDOLPH J. WAITS, ESQ.
1515 Poydras Street
Suite 1950
New Orleans, Louisiana 70112

[3] CHAMBERS CONFERENCE.

THE COURT: This is a pre-trial conference in Garland Rollins vs. South Texas Towing, Inc., Civil Action Number 87-2787-L. In effect, we will open court here so we can take the pleading of the verbal intervention as it were and then of Cenac.

MR. WAITS: Either way. Randolph Waits on behalf of Cenac Towing Company, Incorporated. At this time, we would motion the Court for leave of court to file an amended third party or cross-claim against South Texas Towing alleging in the third party demand or cross-claim our rights as contained in the settlement, more particularly the assignment of portions of the recovery on the plaintiff, Mr. Garland Rollins; and motion the Court to intervene on behalf of Cenac Towing Company

for its interest in the receipt and release and the assignment that was previously executed in this matter.

THE COURT: Well, I think perhaps you ought to offer and introduce into evidence—

MR. WAITS: I would offer and introduce at this time the settlement agreement itself to reflect the assigned interest that Mr. Garland Rollins has introduced to Cenac Towing Company, Incorporated; and it's my understanding that that agreement itself is not to go to the jury as an exhibit, simply for purposes of a complete record in this matter. And we will offer and introduce the settlement agreement, the [4] Receipt, Release, Indemnification and Assignment Agreement. We would offer and introduce that as Cenac Exhibit 1.

THE COURT: All right. Now, we already have a copy of it in the record on the motion for—

MR. WAITS: Motions in limine.

THE COURT: Mr. Jeansonne, do you have any objection to that settlement being in evidence?

MR. JEANSONNE: I have no objection to the settlement being in evidence.

THE COURT: So the settlement is ordered in evidence; and Mr. Waits, I want you to file a formal intervention for the record as soon as you can get one drawn up.

MR. WAITS: I will prepare one during a break this morning and dictate it to my secretary over the phone and have it either Federal Expressed or faxed to an office here so we can file it.

THE COURT: All right. Good. Then I will rule the intervention to be filed—order it to be filed. And I will, upon the motion to dismiss—South Texas Towing has filed a motion to dismiss, and it's probably not actually in the formal record here. I don't know that we have all the papers in our possession. This was filed Friday, I think. But in any event, that motion has been considered this morning; and based on what the Court has said, about the reasons for—all [5] right. The motion to dis-

miss the cross-claims that have been entered by Cenac Towing Company is granted, and it's ordered that the third party demand of Cenac be dismissed. And I'll give the reasons so it will be on the record. Because the third party demand simply asks that Cenac have judgment over and against South Texas in the event Cenac is held liable to the plaintiff; and Cenac has been dismissed by the plaintiff. So the third party demand in that case falls. However, now that Cenac has been permitted to intervene, Cenac will be assigned with the plaintiff and will have assignment as has been put in the record already and will be limited to some extent in opening statement and closing argument to be commensurate with the situation of being on the same side as the plaintiff.

MR. JEANSONNE: Your Honor, while we are on the record, may I note for the purposes of the record the objection which I stated a moment ago while we were off the record. That being that I do not feel that the type of intervention which is being asserted by Cenac in this case is in the nature of a true intervention. I believe that the plaintiff has not transferred a portion of the litigious right which he allegedly possesses against South Texas to Cenac Towing Company. He has merely assigned to Cenac Towing Company a portion of any proceeds that he might recognize from prosecuting litigious rights which he possesses against South [6] Texas given those circumstances. Cenac doesn't have to appear before this Court in order for plaintiff to offer to support South Texas, and I would object to Cenac through its attorney playing any part in these proceedings.

THE COURT: I will address that. I will just quote from the settlement agreement itself. On Page 3 at the bottom, it says "Cenac, Garland Rollins and Jeanette Rollins agree that they will jointly proceed against South Texas in the pending litigation to recover the full damages sustained by Garland and Jeanette Rollins." And it also says "In consideration"—at the top of Page 4—

"In consideration of the amounts paid by Cenac herein, Garland Rollins and Jeanetta Rollins do of their own free will assign, transfer and give over to Cenac a portion of their right to proceed against South Texas, as is set forth below." And then sets forth the specific amounts of the judgment in certain ways, will be proportioned in the event there is a judgment. And so my feeling is that they are a true intervenor. Well, I would say your analogy to the worker's compensation intervention is a good analogy. Only I take it a different way than you do. That is, I think an intervenor is entitled to a party in this case; and I feel they have a legitimate reason to be in it. And for that reason, the objection is overruled.

Okay. Off the record.

* * * *

CERTIFICATE OF REPORTER

I, Patricia L. Gass, Official Court Reporter for the United States District Court, Western District of Louisiana, do hereby certify that the foregoing six pages are a true and accurate transcript of the proceedings had in this matter, as hereinabove set forth, and that I have no interest of any nature whatsoever regarding the ultimate disposition of this litigation.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

/s/ Patricia L. Gass
PATRICIA L. GASS
Official Court Reporter

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Action No. CV87-2728
SECTION "L"
MAGISTRATE SIMON

GARLAND ROLLINS and JEANETTA ROLLINS

versus

SOUTH TEXAS TOWING and
CENAC TOWING COMPANY, INC.

AMENDED CROSS CLAIM AND/OR
INTERVENTION

The Amended Cross Claim and/or Intervention of Cenac Towing Company, Inc. with respect represents:

I.

This is an Amended Cross Claim and/or Intervention within the meaning of either Rule 13 or Rule 24 F.R.C.P. Cross Claimant/Intervenor Cenac Towing Company, Inc. is a Louisiana Corporation domiciled in Houma, Louisiana which at all times pertinent was engaged in the business of inland towing. Made cross defendant and/or defendant in Intervention is South Texas Towing Company, Inc., a Texas corporation also engaged in the business of inland towing.

II.

Cenac Towing was originally made defendant in this action by the plaintiffs who sought recovery for injuries sustained by Garland Rollins which occurred in a collision on the Intracoastal Waterway on or about April 27, 1987. Subsequently, Cenac settled its claims with the plaintiffs, and received an assignment of a portion of their claims. Under the terms of the settlement, Cenac is to receive the first $50,000.00 of any recovery made by the plaintiffs against South Texas, and 50% of any recovery between $100,000.00 and $500,000.00.

III.

Prior to the settlement, Cenac submitted a cross claim seeking contribution and/or indemnity from South Texas Towing Company, Inc. Following the settlement, the Court dismissed that cross claim, ruling that Cenac was not entitled to contribution as a settling defendant.

IV.

Cenac now amends its originally filed claim to assert its claims against South Texas as a partial assignee of the plaintiffs. By reason of the settlement agreement, Cenac is entitled to recover the first $50,000.00 of any recovery against South Texas, and 50% of any recovery between $100,000.00 and $500,000.00.

WHEREFORE, Cenac Towing Company, Inc. prays that after due proceedings are had, that there be judgment in its favor, and against South Texas for the full and true sum of $250,000.00 representing the first $50,000.00 of any recovery made by the plaintiffs, and 50% of any recovery between $100,000.00 and $500,000.00, together with pre-judgment interest, costs, and all other and further relief which may be just and equitable in the premises.

Respectfully submitted this —— day of June, 1990.

EMMETT, COBB, WAITS & KESSENICH

By: _____

RANDOLPH J. WAITS (13157) T.A.
JOHN F. EMMETT (1861)
1515 Poydras Street
Suite 1950
New Orleans, LA 70112
Telephone: (504) 581-1301

CERTIFICATE

I hereby certify that a copy of the foregoing has been served upon all counsel of record by depositing same in the United States Mail, postage prepaid and properly addressed, this — day of May, 1990.

_____

JOHN F. EMMETT

APPENDIX H

RECEIPT, RELEASE, INDEMNIFICATION AND ASSIGNMENT AGREEMENT

WHEREAS, on or about April 27, 1987, the undersigned, Garland Rollins, was employed by South Texas Towing, Inc. ("South Texas") as a seaman and member of the crew of the M/V TIFFANY J; and

WHEREAS, on the aforesaid date, the said Garland Rollins sustained severe personal injuries as a result of a collision between the M/V TIFFANY J and barges in tow of the M/V CULLEN CENAC, owned and operated by Cenac Towing Company, Inc., (hereinafter referred to as "Cenac") on the Intracoastal Waterway outside of Houma, Louisiana, including, without limitation, injuries to his back, spine, sensory-neural and neuropsychological systems, being more particularly identified as the injuries forming the subject matter of the hereinafter referred to lawsuit, as a result of which Garland Rollins faces additional medical complications, a shortened lifespan, and the prospect of never being physically capable of performing any type of labor (including manual, semi-skilled, skilled or otherwise) again; and

WHEREAS, as a result of the aforementioned injuries, Garland Rollins was treated by physicians, including Dr. J. Robert Rivet and Dr. Louis Blanda; and

WHEREAS, Jeanetta Rollins is, and was on April 27, 1987, the lawful wife of the said Garland Rollins, and has made claim upon South Texas and Cenac for damages, including but not limited to the following: loss of consortium, society, love, affection, care, services, attention, damages due to the injuries allegedly suffered by Garland Rollins, as aforesaid, liability for which has been specifically denied by Cenac; and

WHEREAS, as a result of the aforesaid alleged injuries, Garland Rollins and Jeanetta Rollins have made

a claim against South Texas and Cenac, and in furtherance of that claim, have instituted suit in the United States District Court for the Western District of Louisiana in the matter entitled "*Garland Rollins and Jeanetta Rollins v. South Texas Towing Company, Inc. and Cenac Towing Company, Inc.*," Civil Action Number 87-2728 "L" on the Docket of said Court, in which Cenac has appeared and answered, denying liability in the premises; and

WHEREAS, Cenac and Garland and Jeanetta Rollins have conducted an extensive investigation into the facts surrounding the injury of Garland Rollins and such investigation makes it clear that South Texas and its employees were primarily, if not solely, at fault in causing the injuries to Garland Rollins, said fault consisting of, without limitation, a failure of the captain of the M/V TIFFANY J to maintain his course and speed in an overtaking maneuver, navigation of an oversized tow in the Intracoastal Waterway, lack of sufficient horsepower to push the tow of 13 vessels being towed by the M/V TIFFANY J at the time of the accident, and failure to maintain a proper lookout at the time of the accident;

WHEREAS, South Texas, as the Jones Act employer and seaman's employer of Garland Rollins, has willfully, arbitrarily and capriciously denied maintenance and cure benefits to Garland Rollins thereby entitling Garland and Jeanetta Rollins to receive punitive damages from South Texas or its insurers, whether primary or excess; and

WHEREAS, Cenac and Garland and Jeanetta Rollins now wish to compromise and settle all of their differences, and reserving all their rights against South Texas, the M/V TIFFANY J, and their underwriters, as set forth below;

NOW THEREFORE, know all men by these presents that for and in consideration of the sum of TWO HUNDRED FIFTY THOUSAND AND NO/100s

($250,000.00) DOLLARS, said sums being paid by or for the account of Cenac, its underwriters, including the Boston Old Colony Insurance Company, the barges CTCO 194-25 and CTCO 195-25, and the M/V CULLEN CENAC, receipt of said sums being hereby acknowledged and due acquittance and discharge therefore granted, Garland Rollins and Jeanetta Rollins, for themselves, their heirs, assigns, and legal representatives, do hereby release, remise and forever discharge Cenac, Boston Old Colony Insurance Company, the barges CTCO 194-25 and CTCO 195-25, and the M/V CULLEN CENAC, and their agents servants, employees, officers, directors, managers, stockholders, insurers, underwriters, and every other person, firm, underwriter, insurer, company, partnership, organization, corporation, and affiliated and subsidiary corporation, and any other vessel owned, operated, chartered or controlled by the said companies, their operators, charterers, underwriters, tows, masters and crew, of and from any and all liability, claims, liens, remedies, debts, damages, injuries or causes of action of whatever nature or kind which they may now have or which their heirs, assigns, or legal representatives may hereafter acquire, including all costs, expenses, loss of earnings, pain, suffering, disability, punitive damages, and other losses arising out of the injury which was sustained by Garland Rollins and Jeanetta Rollins on or about April 27, 1987, as aforesaid, and any other injury not enumerated hereinabove which may have been sustained by Garland Rollins and Jeanetta Rollins in the past, including without limitation, any rights or claims under the federal statutes or laws known as the Jones Act, or under the general maritime law based upon a claim of unseaworthiness of the M/V CULLEN CENAC or any other vessel, or under the general martime law of negligence, or for past or future maintenance, cure, or wages, or under any compensation statute, state or federal, or in tort or under any theory of strict liability, civil or maritime, or under any contract of insurance whether in law, in equity, or in ad-

miralty, on account of or in anyway connected with the alleged injury which was sustained by Garland Rollins on or about April 27, 1987, or at any other time, either now known or hereafter discovered; and

IN FURTHER CONSIDERATION of the premises, the said Garland Rollins and Jeanetta Rollins do hereby bind and obligate themselves, their heirs, administrators, executors, and assigns, to hold harmless, defend and indemnify Cenac, the parties released hereinabove, and the M/V CULLEN CENAC, their successors, assigns, officers, agents, representatives, stockholders, directors, servants, employees, underwriters and insurers, including any and all affiliated and subsidiary corporations, and all vessels released hereinabove, which might now be or hereinafter become liable unto the said Garland Rollins and/or Jeanetta Rollins, and the injuries which they sustained, and to each and all of them, to hold them harmless and indemnify them or any of them from any claim brought in the future by Garland Rollins, Jeanetta Rollins, their ascendants, descendants, other family members, heirs, successors, or assigns, arising directly or indirectly, as a result of the injuries heretofore recited; and

IN FURTHER CONSIDERATION of the aforementioned payments, Garland Rollins and Jeanetta Rollins agree, and by execution of this Receipt, Release, Indemnification and Assignment Agreement, direct their attorney, Tony Dupre, to dismiss all claims made against Cenac and its vessels in the suit instituted in the United States District Court for the Western District of Louisiana described above, with prejudice, and with each party to bear their own costs; and

IN FURTHER CONSIDERATION of the aforementioned payments, the parties to this agreement acknowledge that they have conducted an extensive investigation of the facts surrounding the injury to Garland Rollins, and such investigation makes it clear that South Texas

and its employees were primarily, if not solely at fault, in causing the injuries to Garland Rollins, said fault consisting of, without limitation, a failure of the Captain of the TIFFANY J to maintain his course and speed in an overtaking maneuver, navigation of an oversized tow in the Intracoastal Waterway, the lack of sufficient horsepower to push the two of thirteen vessels being towed by the TIFFANY J at the time of the accident, and failure to maintain a proper lookout; and

CONSIDERING the fault of South Texas, Cenac, Garland Rollins, and Jeanetta Rollins agree that they will jointly proceed against South Texas in the pending litigation to recover the full damages sustained by Garland and Jeanetta Rollins, it being understood that the payment made by Cenac is only a portion of the damages sustained by Mr. and Mrs. Rollins, and that actual damages are substantially in excess of the $250,000.00 being paid by Cenac and its insurers; and

IN CONSIDERATION OF THE amounts paid by Cenac herein, Garland Rollins and Jeanetta Rollins do of their own free will assign, transfer and give over to Cenac a portion of their right to proceeding against South Texas, as is set forth below:

(1) The first $50,000.00 of any monies recovered from South Texas and its insurers for the claims of Garland and Jeanetta Rollins will be paid to Cenac;

(2) The second $50,000.00 of any monies recovered from South Texas and its insurers will be paid to Garland and Jeanetta Rollins;

(3) The next $400,000.00 of any recovery against South Texas or its insurers will be divided equally between Garland and Jeanetta Rollins and Cenac, with Cenac receiving 50% of any such recovery, and the Rollins receiving 50% of any such recovery;

(4) Any recovery over $500,000.00 shall be paid 100% to Garland and Jeanetta Rollins.

The term "recovery" as used above means any monies actually received in payment from South Texas or its insurers, whether primary or excess, and also includes any amounts received for punitive damages, it being anticipated that such damages will be awarded for South Texas' wilful, arbitrary, and capricious denial of maintenance and cure benefits to Mr. Rollins; and

IT IS UNDERSTOOD AND AGREED that Cenac will never be called upon to pay more than two HUNDRED FIFTY THOUSAND AND NO/100s ($250,000.00) DOLLARS paid in conjunction with this Receipt and Release, and that in the event Cenac is cast in judgment in connection with the claims asserted by South Texas against Cenac for contribution and indemnity, Garland and Jeanetta Rollins agree to indemnify and hold harmless Cenac from and against any such judgment; and

IN FURTHER CONSIDERATION of the aforementioned payments, Jeanetta Rollins and Garland Rollins hereby warrant that they have discussed their physical and mental condition with a physician of their own choosing, and that they are fully aware of their mental and physical condition and of the prognosis for the future; and

IN FURTHER CONSIDERATION of the aforementioned payments, Garland Rollins and Jeanetta Rollins warrant that they are fully aware that their condition may grow worse than it is or seems to be, and that further surgery may be required, and that in executing this Receipt, Release, and Indemnification Agreement, they are completely giving up and discharging any and all rights that they may have against the parties released herein, and that they may never again proceed against such parties in the event their condition worsens in the future, and that they are desirous of accepting the sum

of TWO HUNDRED FIFTY THOUSAND AND NO/100s ($250,000.00) DOLLARS, in full settlement and discharge of all of their legal rights against Cenac and the parties released herein arising out of or resulting from the injuries aforesaid, and that they are of the opinion that the settlement is fair, reasonable and proper under the circumstances.

IT IS EXPRESSLY UNDERSTOOD and agreed that the payments aforementioned are made purely by way of compromise and settlement, and are in no way to be construed as an admission of liability on the part of any party.

THUS DONE AND EXECUTED in multiple original at Ville Platte, Louisiana, this 21st day of December, 1989.

WITNESSES:

/s/ Anthony Dupre

/s/ Cynthia V. Fontenot

/s/ Renee E. Soileau

/s/ Charlotte P. Vidrine

/s/ Garland Rollins
GARLAND ROLLINS

/s/ Jeanetta Rollins
JEANETTA ROLLINS

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF EVANGELINE

BEFORE ME, the undersigned authority, personally came and appeared

GARLAND AND JEANETTA ROLLINS

who, after being duly sworn, did depose and say:

That they did execute the foregoing Receipt, Relase, Indemnification and Assignment Agreement after having read same, and after having it fully explained to them by their attorney, Tony Dupre, and that they did execute it of their own free will with a full understanding of all their legal rights, and that they are of the opinion that the settlement is fair, reasonable, and just under the circumstances.

ALSO CAME AND APPEARED

ANTHONY DUPRE, ESQ.

who, after being duly sworn, did depose and say:

That he is an attorney licensed to practice law in the State of Louisiana, and that he is the attorney-in-fact and of record for Garland Rollins and Jeanetta Rollins; that he did read the foregoing Receipt, Release, Indemnification and Assignment Agreement to Garland Rollins and Jeanetta Rollins, and explain to them all of their legal rights; that he did recommend the foregoing settlement agreement to his clients; and that he is of the opinion that the settlement is fair, reasonable, and just under the circumstances.

Ville Platte, Louisiana this 21st day of December, 1989.

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 21st DAY
OF December, 1989

/s/ [Illegible]
Notary Public

/s/ Garland Rollins
GARLAND ROLLINS

/s/ Jeanetta Rollins
JEANETTA ROLLINS

/s/ Anthony Dupre
ANTHONY DUPRE, ESQ.

APPENDIX I

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-1843
Summary Calendar

EDWIN T. TEAL and HILDE TEAL,
Plaintiffs-Appellants,

v.

EAGLE FLEET, INC., *et al.*,
Defendants-Third Party Plaintiffs,

v.

PENROD DRILLING CORPORATION,
Third Party Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

June 17, 1991

Before GOLDBERG, JOLLY, and JONES, Circuit Judges.

PER CURIAM:

Edwin Teal and his wife seek to appeal the district court's denial of motions seeking to set aside a settlement agreement the Teals entered into with Penrod Drilling Corporation ("Penrod"). The district court denied these various motions on procedural grounds. The Teals also contest the district court's decision to grant Penrod's

motion to dismiss for failure to state a claim, arguing that the district court erred in dismissing Penrod without first addressing the merits of the settlement agreement. Because we find that the issue of the validity of the settlement agreement was never properly before the district court, we affirm.

I. FACTS AND PROCEEDINGS BELOW

This action arises out of an accident in which Edwin Teal, a roustabout employed by Penrod, was injured when a crane operator on a Penrod jackup rig lowered him from a personnel basket onto the M/V AMERICAN EAGLE, a vessel owned and operated by Eagle Fleet, Inc. ("Eagle"). On August 20, 1986, Teal and his wife entered into a settlement agreement with Penrod. Under the terms of the settlement agreement, the Teals retained their rights to sue Eagle.

Subsequent to entering into their settlement agreement with Penrod, the Teals brought this action against Eagle and the M/V AMERICAN EAGLE. On August 1, 1989, Eagle filed a third party complaint against Penrod, tendering Penrod to the Teals pursuant to Federal Rule of Civil Procedure 14(c). Eagle also filed a motion to set aside the settlement between the Teals and Penrod, arguing that the district court should declare this agreement invalid because Penrod procured it through overreaching and without obtaining the Teals' full understanding of its content and consequeces.

Penrod timely filed an answer to Eagle's third party complaint and also filed a motion to dismiss, asserting lack of jurisdiction and, alternatively, failure to state a claim upon which relief could be granted. Subsequently, the district court denied Eagle's motion to set aside the settlement, finding that Eagle lacked standing to attack the settlement agreement because it was not prejudiced by the settlement. On October 27, 1989, Eagle filed a motion for reconsideration, arguing that it had standing

to challenge the settlement agreement because it would suffer legal prejudice if the court failed to reduce its liability to the Teals by the amount of Penrod's liability. Eagle's motion for reconsideration was set for hearing on December 12, 1989. Two months after this scheduled hearing date, the Teals filed a memorandum in support of Eagle's motion for reconsideration.

On February 26, 1990, the Teals filed their first motion to set aside the settlement. When the Teals filed this motion, the trial was set for March 19, 1990. The court's standard pretrial order specifically stated that all dispositive motions must be filed sixty days prior to the pre-trial date. On March 13, 1990, the court entered an order denying both Eagle's motion for reconsideration and the Teals' motion to set aside the settlement. The court held that Eagle would not be prejudiced by the settlement with Penrod because the court would apportion damages pro rata in accordance with *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979). In addition, the district court denied the Teals' motion to set aside the settlement as "obviously" untimely.

In an order dated March 16, 1990, the district court addressed Penrod's motion to dismiss. The court held that it did have subject matter jurisdiction over Penrod because the Teals properly invoked admiralty jurisdiction, and therefore Eagle properly tendered Penrod to the plaintiffs pursuant to Rule 14(c). Nevertheless, the court granted Penrod's motion to dismiss for failure to state a claim, finding that Penrod had already settled with the Teals and Eagle was not prejudiced by that settlement. On March 29, 1990, the Teals filed a motion for reconsideration of the court's order refusing to set aside the settlement agreement, arguing once again that the Teals did not understand the nature of the settlement agreement, and also arguing that Penrod had breached the agreement. The Teals attached to this motion for

reconsideration certain exhibits and an affidavit from Teal which had not previously been submitted to the court. The district court denied the Teals' motion for reconsideration, noting that they could have presented the additional evidence in their first motion and, therefore, relief was not available under a motion to reconsider.

Prior to the district court's denial of their motion for reconsideration, the Teals settled their claim with Eagle for an undisclosed sum and, upon the district court's denial of the Teals' motion for reconsideration, the matter was dismissed. The Teals subsequently filed this appeal, arguing that the district court erred when it dismissed the Teals' claims against Penrod without addressing the validity of the settlement agreement.

II. DISCUSSION

A. *Jurisdiction*

Penrod argued in the district court, and argues now on appeal, that the district court never properly acquired jurisdiction over it. According to Penrod, the Teals' failure to specifically plead their cause as one arising under Rule 9(h), Fed.R.Civ.P., precluded Eagle from filing a Rule 14(c)[1] demand against Penrod. Rule 9(h) provides in pertinent part:

> A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that

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[1] Third party claims under Rule 14(c) are only available in admiralty or martime claims. Fed.R.Civ.P. 14(c). Rule 14(c) allows a defendant to implead a third party who he claims is "wholly or partly liable, either to the plaintiff or to [himself] . . . on account of the same transaction, occurrences, or series of transactions or occurrences." *Id.* Where such a demand is made, Rule 14(c) provides that "the third-party defendant shall make his defenses to the claims of the plaintiff . . . and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff." *Id.*

> is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rule 14(c). . . .

Fed.R.Civ.P. 9(h). The Teals titled their complaint as follows: "COMPLAINT WITHIN THE ADMIRALTY AND MARITIME JURISDICTION PURSUANT TO THE GENERAL MARTIME LAW OF THE UNITED STATES OF AMERICA. . . ." Their complaint goes on to state that: "This case is cognizable under the admiralty and maritime jurisdiction pursuant to the General Maritime Law of the United States of America, 28 U.S.C. [§] 1333 and diversity of citizenship. . . ." In addition, the Teals pled an *in rem* action against the M/V AMERICAN EAGLE.

Although the Teals' complaint did not specifically invoke Rule 9(h), this court has held that a case cognizable under both admiralty and diversity jurisdiction will be treated as an admiralty action if the plaintiff asserts "a simple statement asserting admiralty or maritime claims." *T.N.T. Marine Serv., Inc. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585, 588 (5th Cir.), *cert. denied*, 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983); *cf.* 5 Wright & Miller, Federal Practice and Procedure; Civil 2d § 1313 at 719 (1990) (preferred technique is to expressly invoke Rule 9(h)). Therefore, under our jurisprudence, a party need not make a specific reference to Rule 9(h) in order to fall under our admiralty jurisdiction. *See Durden v. Exxon Corp.*, 803 F.2d 845, 848-50 (5th Cir.1986); *T.N.T. Marine*, 702 F.2d at 586-88.

In *T.N.T. Marine* and *Durden*, the plaintiffs asserted both admiralty and diversity jurisdiction. In addition, in both cases *in rem* actions were pled against the vessel involved. Although neither plaintiff's complaint specifically mentioned Rule 9(h), both complaints contained simple statements asserting admiralty or maritime claims or jurisdiction. Consequently, in both cases this court held that the plaintiff had properly invoked admiralty jurisdiction.

See T.N.T. Marine, 702 F.2d at 587; *Durden*, 803 F.2d at 850; *cf. Bodden v. Osgood*, 879 F.2d 184, 186 (5th Cir. 1989) (where complaint alleged suit brought under admiralty and general maritime laws, but where suit was filed in state court which lacked jurisdiction and plaintiff failed to object to defendant's removal to federal court solely on diversity grounds, no admiralty jurisdiction). Because this court finds that the Teals properly invoked admiralty rules and procedures in their original complaint, we hold that Eagle properly tendered Penrod to the plaintiffs pursuant to Rule 14(c).

B. *The Settlement Agreement*

In the district court, Eagle moved to set aside the Teals' settlement with Penrod, arguing that the court should declare this agreement invalid because it was procured through overreaching and without the Teals' full understanding of its content and consequences. We hold that the district court correctly denied this motion because Eagle did not have standing to attack the validity of the settlement when it was not prejudiced by that agreement.

The general rule in this court is that "a non-settling defendant . . . [who] is not prejudiced by the settlement . . . has no standing to complain about the settlement." *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 172 (5th Cir.1979), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3028, 69 L.Ed.2d 405 (1981); *see also Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1160 n. 10 (5th Cir. 1989). The district court correctly held that any damages awarded to the Teals would be allocated among the parties proportionate with their degree of fault. *See Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1248 (5th Cir.1979).[2] Therefore Eagle was not prejudiced by

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[2] Eagle argued that the application of the credit doctrie enunciated in *Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir. 1988), would prejudice Eagle. *Hernandez* provides a dollar for dollar reduc-

the settlement because the court would have reduced any judgment in favor of the Teals by the proportion of negligence attributable to Penrod and Eagle would only have had to pay their proportionate share. Consequently Eagle lacked any claim against Penrod. For similar reasons, the court correctly denied Eagle's motion for reconsideration.

Moreover, the Teals did not timely contest the settlement agreement. It is well established that seamen, like Teal, are wards of admiralty whose rights federal courts are duty-bound to jealously protect. *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1160-61 (5th Cir.1985); *see also Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942). In addition, this court has long recognized that courts must be particularly vigilant to guard against overreaching when a seaman purports to release his right to compensation for personal injuries. *See, e.g., Wink v. Rowan Drilling Co.*, 611 F.2d 98, 100 (5th Cir.) ("releases or settlements involving seaman's rights are subject to careful scrutiny"), *cert. denied*, 449 U.S. 823, 101 S.Ct. 84, 66 L.Ed.2d 26 (1980).

It does not follow, however, that a district court must independently reject a settlement agreement which has not been attacked by a party to the agreement with standing to object. *Bass*, 749 F.2d at 1160 n. 10, 1161 n. 12. Although a district court may have inherent authority to *sua sponte* raise the validity of a seaman's release, a court is certainly not required to do so. *Id.* Therefore, the district court was not required to independently inquire into the merits of the Teals' settlement with Penrod unless the issue was raised in a timely manner by a party to the agreement, i.e. the Teals.

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tion to the non-selling party, as opposed to the pro rata reduction espoused in *Leger*. The district correctly held that *Leger* was applicable to this case.

The Teals' first formal challenge to the settlement was not filed until February 28, 1990, even though more than four months earlier the district court specifically pointed out in its ruling denying Eagle's motion to set aside the settlement that Eagle lacked standing to attack the validity of the settlement and that the Teals had not filed any pleadings attacking the settlement. In their memorandum in support of Eagle's motion for reconsideration, filed February 12, 1990, the Teals merely sought application of the *Hernandez* dollar for dollar allocation doctrine, and alternatively suggested that the court examine the settlement. On February 28, 1990, the Teals filed their first independent motion to set aside the settlement agreement.

When both of these pleadings were filed, the trial of this matter was scheduled for March 19, 1990. According to the district court's standard pretrial order concerning deadlines, all dispositive motions had to be filed no later than sixty days prior to the pre-trial date. The district court enjoys broad discretion in controlling its own docket. *Edwards v. Cass County, Tex.*, 919 F.2d 273, 275 (5th Cir. 1990). Since the Teals made no showing that their delay in challenging the settlement was warranted, the district court's denial of the motion as untimely was well within the court's discretion. The district court should not be obliged to interrupt the orderly proceedings of its docket to rule on this issue when the Teals could have easily presented these matters earlier. *Id.* at 275-76.

The district court subsequently addressed Penrod's motion to dismiss. After correctly finding that admiralty jurisdiction was properly invoked, the court ruled that since Penrod settled with the Teals before Eagle instituted the third party action against Penrod, the Teals no longer had a cause of action against Penrod. This was correct because even though the Teals were not barred from contesting the validity of the settlement, they had not exercised this right in a timely fashion. Furthermore, in the

absence of a direct attack on the settlement agreement, when the "plaintiff settles with and grants a release as to one or more [defendants], reserving his rights against the remaining [defendants], the settling defendants are relieved of any further liability to the plaintiff." *Leger*, 592 F.2d at 1249. Therefore, since neither Eagle nor the Teals had an asserted, valid claim against Penrod, the district court correctly granted Penrod's motion to dismiss. *See* Fed.R.Civ.P. 12(b)(6).

The trial scheduled for March 19, 1990, never occurred because after the court dismissed Penrod, the Teals settled their claim with Eagle. After the district court dismissed Penrod, the Teals filed a motion to reconsider and set aside the settlement, arguing that they did not have a full understanding of the effect of the agreement when they signed it, and arguing that Penrod had breached the settlement agreement. The Teals attached to this motion for reconsideration certain exhibits and an affidavit from Teal which had not previously been submitted to the court. The district court also denied this motion on procedural grounds.

At the district court correctly noted, the Federal Rules of Civil Procedure do not specifically provide for a "motion for reconsideration." *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir.1990). This court has held, however, that such a motion which challenges the prior judgment on its merits will be treated as either a motion "to alter or amend" under Rule 59(e) or a motion for "relief from judgment" under Rule 60(b).[3] Since the district court had already dismissed Penrod from the action when the Teals filed their motion for reconsideration, we find that this motion essentially challenged the court's judgment in dismissing Penrod. Since this motion was filed more than ten days after the

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[3] *Id.*; *see also Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 288 (5th Cir. 1989); *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 669-70 (5th Cir.) (*en banc*), *cert. denied*, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986).

rendition of the judgment dismissing Penrod, it falls under Rule 60(b). *Lavespere*, 910 F.2d at 173.[4]

Under Rule 60(b), in order to prevail the Teals must have demonstrated that the evidence in support of their motion to reconsider was not presented in their original motion to upset the settlement due to: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . .; (3) fraud . . .; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged . . .; or (6) any other reason justifying relief from the operation of the judgment." Fed.R.Civ.P. 60(b). The district court enjoys considerable discretion when determining whether the movant has satisfied any of these Rule 60(b) standards. *Lavespere*, 910 F.2d at 173; *see also Smith v. Alumax Extrusions, Inc.*, 868 F.2d 1469, 1471 (5th Cir.1989).

In their motion for reconsideration, the Teals did not even attempt to explain why their new evidence could not have been brought as part of their initial motion to set aside the settlement. Indeed, the district court's careful review of the new evidence revealed that all of the vidence was available at the time the Teals filed their first motion. Therefore, the district court did not abuse its discretion when it denied the Teals' motion for reconsideration.

III. CONCLUSION

For the above-stated reasons, we AFFIRM the decision of the district court.

AFFIRMED.

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[4] Whether this court treats the motion under Rule 59(e) or Rule 60(b) depends on the time at which the motion is served. If the motion is served within ten days of the rendition of judgment, the motion falls under Rule 59(e); if it is served after that time, it falls under Rule 60(b). *Lavespere*, 910 F.2d at 173; *Harcon Barge*, 784 F.2d at 667.